UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

Docket ID: BIA-2013-0007; RIN 1076-AF18

COMMENTS OF THE STATE OF CONNECTICUT ON THE PROPOSED RULEMAKING REVISING THE REGULATIONS GOVERNING FEDERAL TRIBAL ACKNOWLEDGMENT IN 25 C.F.R. PART 83

STATE OF CONNECTICUT

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I. Introduction

On behalf of the State of Connecticut (State), George Jepsen, Attorney General of Connecticut, submits these written comments on the proposed rulemaking revising the regulations governing federal tribal acknowledgment in 25 C.F.R. Part 83.

The Department proposes to reform broadly its acknowledgment process. As it states, the existing process has frequently been criticized by many as "broken." Notice, at 1. The proposed rules, the Department maintains, would repair the process by making the decision process quicker, reducing documentary burdens, establishing objective standards and improving transparency, predictability and finality. *Id.* As laudable as the goal of reform may be, the means the Department has chosen are the wrong ones. The proposed rules are not just an easing of needless administrative burdens or a trimming of duplicative bureaucratic reviews and procedures.

Instead, for the first time in the nearly forty-year history of the acknowledgment regulations, the Department is making wholesale, dramatic changes in the ***substantive*** requirements for acknowledgment as an Indian tribe. These changes will have the effect of seriously weakening and undermining the core acknowledgment criteria. Moreover, as applied to previously denied Connecticut petitioners, they would appear to have the effect of reversing prior acknowledgment decisions for reasons that were expressly rejected in those decisions. Rather than improving transparency, predictability and finality, the proposed changes may undo settled decisions on which the State and others had expended significant resources to obtain and on which they have relied. The changes

proposed cannot be justified in the name of reform and expediency and are contrary to the principles that have long governed federal tribal acknowledgement.

Tribal acknowledgment, both administratively though the Department's acknowledgment process and through judicial decisions, has always been premised on certain bedrock considerations. Federal acknowledgment of an Indian tribe is an act that recognizes a political entity and cannot be based on Indian descent alone. *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Morton v. Mancari*, 417 U.S. 535, 553 (1974); *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215 (D.C. Cir. 2013); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278 (9th Cir. 2004). What distinguishes a tribe that is entitled to a government-to-government relationship and all the benefits of that federal tribal sovereign status entails is not just that it is a group with members who descend from a historical Indian tribe. Rather, a tribe is a community in which political relations and activities exist and have been maintained continuously. *Miami Nation of Indians of Indiana, Inc. v. United States Dept. of Interior*, 255 F.3d 342, 350-51 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002); *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

The continuous existence as a distinct community and the continuous exercise of political influence or authority within the group, commonly known as the community and political authority criteria, are central to the decision to acknowledge an Indian tribe and to place them in a government-to-government relationship with the federal government. These two core criteria are derived from a long line of judicial precedent that emphasizes that both community and political authority as essential attributes to the existence of a

tribal sovereign entity. *Montoya v. United States*, 180 U.S. 261, 266 (1901); *United States v. Candelaria*, 271 U.S. 432, 439 (1926); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994). Moreover, the importance of these criteria is reflected in their central place in the acknowledgment regulations. *See* 43 Fed. Reg. 39,361-62 (Sept. 5, 1978) (preamble to original regulations).

The proposed rules represent an unprecedented break from these established understandings of acknowledgment principles. The extraordinary scope and magnitude of these changes raises a fundamental question that the Department should squarely address: What is its authority for promulgating these proposed rules that so significantly change the existing substantive criteria for acknowledgment?

The Department in the past has relied on 25 U.S.C. §§ 2 and 9, which provide very general authority over the management of Indian affairs and for adopting regulations therefor, as the source of Congress's delegation of authority to it for the promulgation of the acknowledgment regulations.[1] Neither statute addresses tribal acknowledgment generally or offers any guidance or principles as to the criteria or standards that ought to be applied for acknowledgment decisions.

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[1] Section 2 provides:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

Section 9 provides:

> The President may prescribe as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

Several federal courts have, with little discussion or analysis, concluded that Congress did delegate authority to the Department to promulgate acknowledgment regulations. *See James v. U.S. Dept. of Health & Human Servcs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001). However, these courts did little more than cite 25 U.S.C. §§ 2 and 9, and did not address the more fundamental question of whether Congress's delegation was constitutional.[2] The scope and constitutionality of the Department's delegated authority remains an open question.

An agency has no power to act except to the extent that Congress has lawfully delegated such power to it. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Moreover, when "Congress confers authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.'" *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). Although Congress may afford an agency considerable discretion in exercising its delegated authority, there must be at least some minimal statement of policy or principle to provide guidance for that exercise. *Id.* at 475; *Yakus v. United States*, 321 U.S. 414, 426 (1944).

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[2] One federal district court purported to do so, but its brief analysis can hardly be called persuasive. In *Robinson v. Salazar,* 885 F. Supp. 2d 1002 (E.D. Cal. 2012), *appeal dismissed*, Dkt. 12-17151 (9th Cir. Feb. 26, 2013), the district court rejected the claim that the acknowledgment regulations were adopted pursuant to an unconstitutional delegation of authority because the plaintiff's arguments were too "generalized," and did not itself make any real effort to grapple with the constitutional standards *Id.* at 1037.

On their face, neither § 2 nor § 9 of Title 25 provides what could reasonably be called an "intelligible principle" to guide the Department's authority to acknowledge Indian tribes. Both provisions speak only in the most general terms about the management of Indian affairs. Neither addresses the question of tribal acknowledgment, expressly or by implication, and do not hint at even the broadest of principles to guide the Department's discretion. Indeed, the wholesale changes to the substantive criteria in the proposed rules reflect the lack of constitutionally required guidance in the delegated authority. Before the Department adopts the proposed rules – which diverge so significantly from the existing substantive criteria and long standing principles of tribal acknowledgment found in its own past decisions as well as the case law – the Department must first address and resolve this very serious question of its delegated authority. The State submits that, applying the proper standard as to congressional delegation, the Department cannot justify the changes its now proposes.

As discussed in detail below, numerous provisions, both pertaining to the substance of the acknowledgment criteria and the administrative process, are highly problematic and inconsistent with long standing principles governing tribal acknowledgment. Because of the breadth of the problems throughout the proposed rules and the interconnected nature of the wholesale changes proposed, the State urges the Department to reject the proposed rules in their entirety. At a minimum, the Department should substantially modify the proposed rules to address the concerns the State has raised and resubmit them to public comment before promulgating final rules.

II. The Provision Allowing Previously Denied Petitioners to Re-Petition Does Not Adequately Protect the Interests of Third Parties in the Finality of Prior Acknowledgment Decisions.

In recognition of the compelling interests of third parties in the finality of previous acknowledgment decisions, the Department has proposed conditioning a previously denied petitioner's right to re-petition under the proposed regulations on the consent of third parties that had participated in administrative or court review of those decisions. The better rule would be to preclude re-petitioning under such circumstances. Particularly given the uncertainty about potential legal challenges to the proposed third-party consent requirement, the protection the Department purports to offer to third parties is chimerical. The interests of third parties such as the State should not be put at risk in this way. Previously denied petitioners should not be permitted to re-petition.

Proposed § 83.4(b) would provide that a previously denied petitioner may re-petition under the new rules only if "[a]ny third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the petitioner has consented in writing to the re-petitioning...." Proposed § 83.4(b)(1)(i). The proposed rule would also require that a previously denied petitioner prove by a preponderance of the evidence that a change from the previous regulations warrants reconsideration of the denial or that the "reasonable likelihood" standard of proof was misapplied in it. Proposed § 83.4(b)(1)(ii).

The Notice offers as the rationale for this third-party consent requirement is to take account of the interests in finality of those third parties that participated in the litigation of previous petition decisions. Specifically, the Notice states:

> Requiring third-party consent recognizes the equitable interests of third parties that expended sometimes significant resources to participate in the adjudication and have since developed reliance interests in the outcome of such adjudication. Having weighed these equity considerations, the Department has determined that the proposed rule must acknowledge these third-party interests in adjudicated decisions.

Notice, at 6.

In Connecticut, the State, municipalities and private parties have had extensive involvement in several federal acknowledgment petitions. In particular, the Eastern Pequot, Schaghticoke Tribal Nation (STN), and Golden Hill Paugussett (GHP) groups each had acknowledgment petitions that were denied by the BIA after full and fair proceedings, including subsequent administrative and court review. *Reconsidered Final Determination Denying Federal Acknowledgment to the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut* (Oct. 11, 2005) (*EP RFD*); *Reconsidered Final Determination Denying Federal Acknowledgment to the Petitioner Schaghticoke Tribal Nation* (Oct. 11, 2005) (*STN RFD*); *Final Determination Against Federal Acknowledgment of the Golden Hill Paugussett Tribe* (June 14, 2004) (*GHP FD*). The State was an active interested party in each of the proceedings on these petitions, as were several Connecticut municipalities and private interested parties. The decisions on these petitions were the outcomes of lengthy proceedings in which the petitioners and interested parties submitted thousands upon thousands of pages of documents, exhaustive expert analyses, historical evidence, and legal briefs. All parties, and in particular the petitioners, had a full and fair opportunity to present evidence and make their arguments. These decisions have been the subject of review before the

Interior Board of Indian Appeals (IBIA), the Secretary, and the courts. *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp.2d 389 (D. Conn. 2008), *aff'd per curium*, 587 F.3d 132 (2d Cir. 2009), *cert. denied*, 131 U.S. 127 (2010); *Historic Eastern Pequot v. Salazar*, 934 F. Supp. 2d 272 (D.D.C. Mar. 31, 2013); *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192 (D. Conn. 2006). As the Department has indicated, the interests of the State and others in the finality of these decisions, after having expended significant resources in the proceedings and litigation, deserve protection.

Under the current regulations, previously denied petitioners are not allowed to petition again. 25 C.F.R. § 83.10(p). This should remain the rule. The stated purpose of the proposed rules ostensibly is not to change the substantive nature or requirements of federal acknowledgment, but rather to "fix" and clarify the process. Where, as in the case of the Connecticut petitioners, the petitioners had a full and fair opportunity to present evidence and make their arguments and to seek administrative and judicial review of the decisions denying acknowledgment, there is no justification to permit the petitioners, and to require the interested parties to again expend their resources, to pursue acknowledgment anew. The previously denied petitioners had their opportunity to prove their tribal existence. They failed. The proposed rule allowing re-petitioning should be eliminated.

The proposed rule offers a somewhat unique mechanism to protect the interests of third parties in the finality of past decisions. It proposes that third parties that participated in administrative or court review must consent to a previously denied petitioner's request to re-petition. The State recognizes that the Department is seeking to

protect justified third party interests in proposing the consent requirement. However, it is rather novel, and its legality will likely be questioned. Indeed, the previously denied Connecticut petitioners have publicly challenged the constitutionality and lawfulness of the proposed rule, and if it is adopted as proposed, there will certainly be litigation about it. Although the State believes there are sound arguments in support of its lawfulness, no one can say with any reasonable certitude what the outcome of such litigation will be. The interests of third parties should not be put at such risk. The very purpose of the third-party consent requirement is to protect those parties from having to reengage with the administrative or court process; the novel nature of the requirement, however, appears to do just the opposite, exposing the third parties to extensive and uncertain litigation. The better course to protect the interests of third parties – a necessity that the Department recognizes – would be to preclude re-petitioning altogether.

III. The Existence of State Reservations Should Not Be Used as a Proxy for Actual Evidence of Community and Political Authority.

The proposed rules would eliminate the long standing and essential requirement that a petitioner must demonstrate that it existed as a community with political authority as long as it maintained a state reservation since 1934. This use of state reservations as a proxy for the core criteria of community and political authority is premised on factual assumptions that, at least in the case of Connecticut petitioners, have already been determined to be false. The Department's proposed use of this proxy rule is factually unjustified and has no support in acknowledgment policy or law. It should be rejected.

Under the proposed regulations, a petitioner could satisfy both the community and political authority criteria if the petitioner "has maintained since 1934 to the present a State reservation." Proposed §§ 83.11(b)(3), 83.11(c)(3). The Notice asserts that

> [r]egardless of what a State's process or criteria are for acknowledging a tribe, if a State recognizes land as a reservation for a petitioner for nearly the past 80 years continuously, it indicates the existence of a community possessing the requisite political cohesiveness to maintain the tribal land base. Maintenance of a State reservation since 1934 until present indicates a high likelihood that the community actually interacted throughout this time period by providing a physical location for such interactions. Likewise, maintenance of a State reservation since 1934 also indicates the petitioner had political authority/influence during this time period because some governing structure was necessary to address activities on the land and interact with the State regarding the reservation. In short, a State reservation is a formalization of "collective rights in Indian land" that the Department identified as a dispositive indicator of an Indian tribe.

Notice, at 14-15.

The rationale offered in support of the proposed state reservation proxy rule is premised on several factual assumptions, some of which might be true for some petitioners, but which are decidedly not true in the case of the Connecticut petitioners. Indeed, the factual premises on which the Department builds this proxy rule were the central issues litigated in the Connecticut petitions. The factual assumptions underlying Department's rationale include:

- The State's purpose or reasons for maintaining a reservation do not matter.
- The mere existence of a state reservation since 1934 means that a community with political cohesiveness existed to maintain it.
- A presence of a state reservation indicates a "high likelihood that the community actually interacted" because the reservation provided a physical location for social interactions.

- Maintenance of a state reservation indicates that political authority existed within the community "to address activities on the land and interact with the State regarding the reservation."

Notice, at 14-15. These are all facts that, depending on the evidence relating to a particular petitioner and the State that maintained the reservation, may or may not be true. In the case of the Connecticut petitioners, those facts are not true. To simply assume them by administrative fiat is the essence of arbitrary governmental action.

The three Connecticut petitioners failed to achieve acknowledgment principally because they could not satisfy the core acknowledgment criteria for very long periods of their history.[3] Despite these clear deficiencies in the historical evidence, the Department initially issued decisions that would have granted acknowledgment to the Eastern Pequot and STN petitioners. *Final Determination in Regard to Federal Acknowledgment of the Eastern Pequot Indians of Connecticut as a Portion of the Historical Eastern Pequot Tribe* (June 24, 2002) (*HEP FD*); *Final Determination for Federal Acknowledgment of the Schaghticoke Tribal Nation* (Jan. 29, 2004) (*STN FD*). The Department's basis for doing so in the face of the otherwise plainly insufficient facts was to assume that the State's historical relationship with these groups – principally comprised of the maintenance of state reservations – reflected an implicit recognition by the state of a

[3] For example, the STN petitioner was denied acknowledgment, among other things, because it could not demonstrate it had continuously existed as a social community (criterion (b)) and it failed to show the continuous exercise of political influence or authority (criterion (c)) for nearly all of the twentieth century. *STN RFD*, at 45, 50-58. The Eastern Pequot petitions were denied primarily because of the lack of evidence of political influence or authority from 1913 to 1973 and because the two petitioning groups did not exist as a community and did not exercise political authority as a group from the 1980s to 2002. *EP RFD*, at 91, 131-35. The GHP petitioner was denied acknowledgment for failure to satisfy not only the community and political authority criteria for nearly its entire history, but also for failure to show that its members had descended from a historical tribe (criterion (e)). *GHP FD*, at 91-92, 102-03, 128-29.

political tribal entity. According to the Department's rationale, it could fill the evidentiary gaps because the State had maintained state reservations as part of an ill-defined relationship with these groups. *HEP FD*, at 29-30, 77; *STN FD*, at 118-24. However, there simply was no factual or legal basis for doing so, and the State and other interested parties sought review before the IBIA.

The IBIA concluded that the use of the State's relationship was contrary to the acknowledgment regulations. *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1 (2005); *In re Federal Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 30 (2005). In particular, the IBIA concluded that the asserted "implicit" recognition by the State of the groups as political entities, by among other things maintaining state reservations, was not itself probative of the key criteria of community and political authority. 41 IBIA at 18. More than just the so-called "additional evidence" of a state reservation and other aspects of the State's historical relationship was needed for that relationship to prove anything relevant to community or political authority. *Id.* At 18-20. Instead, the IBIA concluded that the Department "must articulate more specifically how the State's actions toward the group during the relevant time period(s) reflected or indicated the likelihood of community or political influence or authority within a single group." *Id.* at 21. In other words, what is essential to show community and political authority is not the mere existence of a state reservation, but what the petitioner and the State ***actually did*** in connection with it. The IBIA accordingly vacated the decisions and remanded them to the Assistant Secretary.

The reconsidered final determinations for both petitioners specifically addressed this issue. On reconsideration after the IBIA's corrective directions, the Department properly determined that the maintenance of the state reservations offered no evidence of community or political authority. Specifically, as to the Eastern Pequot petitioners, the reconsidered final determination found:

> The Lantern Hill reservation was the focal point of the relationship with the Colony and later the State. Upon a reevaluation of the evidence, this reconsidered FD concludes that the maintenance of the reservation by the State was not predicated on a government-to-government relationship with the group or the existence within the group of bilateral political relations that provides evidence of political authority or influence. This aspect of the state relationship based on the maintenance of the Lantern Hill Reservation does not provide evidence for criterion 83.7(c).

EP RFD, at 75. The reconsidered final determination for the STN petitioner reached an identical conclusion. *STN RFD,* at 50.

Particularly for those periods of time for which the petitioners lacked actual evidence of community and political authority, the evidence showed that the State maintained the reservations as long as there remained descendants of the original tribes for which the reservations were first established, not because the State considered the group to be political community or because the group acted in its relationship with the State in a way that reflected the exercise of political authority or influence. *EP RFD*, at 73-77; *STN RFD,* at 48-50. Because there was no evidence that the presence of the state reservation itself showed that the petitioners had in fact interacted socially or that political authority was exercised, either as to the use of the reservation or as to the relationship with the State, the petitioners could not rely on the assumption, as the

proposed rule would allow them to, that community and political authority must have existed. Instead, the petitioners had to produce actual evidence that the community interacted and that political authority in fact was exercised in connection with the reservation. They were unable to do so. *Id.*

The Department would choose to ignore these factual determinations and instead to declare that the opposite must be true. The potential absurdity of the state reservation proxy rule and the arbitrary nature of its factual premises are revealed by examining how the proxy rule might apply to the GHP petitioner. The GHP has a one-quarter acre reservation located in Trumbull, Connecticut.[4] Although the historical record as to this parcel is somewhat unclear, it appears to have been established in 1933. *GHP FD*, at App. A1. The evidence reveals that only a few individuals from a single family were ever involved with this very small reservation. *Id.* at App. A3. Yet presumably the Department would assume that because the reservation was maintained from 1934, there must have been a community with political authority. The actual facts, as determined by the Department, of course are that this was not the case. *Id.* at 91-92, 102-03.

The Notice suggests that the state reservation proxy rule would be consistent with long standing acknowledgment principles reflected in Felix Cohen's treatise, *Handbook of Federal Indian Law* (1945). Notice, at 11, 15. Nothing in Cohen's discussion of tribal existence, on which the Department relies, suggests that "collective rights in lands" encompassed state reservations, as opposed to federal reservation lands, or that the

[4] A second reservation was established in Colchester, Connecticut in 1981, which would not be implicated under the proposed rule.

significance or nature of state reservations was evaluated at all. Rather, the discussion is focused on tribal lands granted or maintained by the federal government. *Handbook of Federal Indian Law,* at 271-72. To permit the complete satisfaction of the community and political authority criteria on the basis of the fact that a state reservation has been maintained demands a thorough understanding of the history and significance of a state reservation. That understanding is plainly absent.

What ought to be essential for acknowledgment purposes is that the petitioner actually engaged in some activity to maintain the state reservation, not that the State kept in existence a state reservation as long as descendants of the original tribe remained. The group's activity, either in terms of maintaining or using it, should not be simply presumed, as the Department proposes.

The State seriously questions the extent to which the state reservation proxy rule will serve the Department's stated goal of improving the efficiency and transparency of the acknowledgment process generally. There are very few states that have maintained state reservations since 1934. The State's research has not revealed any previously denied petitioners other than the Connecticut petitioners that have state reservations since 1934. It appears that there may be an exceedingly small number of petitioners that would be affected by this proposed rule, other than the Connecticut petitioners. The Notice includes no discussion of the number of potential petitioners with state reservations or the real extent to which the adoption of the rule will ease the Department's tasks. It is apparent that, at least as to the Connecticut petitioners, the proposed rule cannot be justified as improving the acknowledgment process. Instead, it appears to be directed,

again at least as to its application to the Connecticut petitioners, at reversing through regulation the previous fact-based decisions denying acknowledgment.

If the Department determines nevertheless to adopt a state reservation rule, it must be significantly modified so as not to seriously undermine the community and political authority criteria. Specifically, the rule should include two additional requirements to ensure that the maintenance of a state reservation in fact reflects the continual existence of community and political authority. First, the State in which the reservation is located should expressly confirm that the reservation was maintained because of the existence of a tribal community in which political influence or authority was exercised. If the State does not make this confirmation, a petitioner should be required to demonstrate what the Department's proposed rule merely assumes: That the petitioner's maintenance of the reservation actually provided a physical location for social interactions and that such interaction did in fact occur, and that political authority did in fact address activities on the land and meaningfully interacted with the State regarding the reservation.

Accordingly, the State proposes the following language in place of the proposed §§ 83.11(b)(3) and (c)(3):

> § 83.11(b)(3):
>
> (3) The petitioner will be considered to have provided sufficient evidence to demonstrate distinct community if it demonstrates either of the following factors:
>
> > (i) The petitioner has maintained a State reservation, only if (a) the State in which the reservation is located confirms in writing that the petitioner maintained a distinct community on such reservation or (b) the petitioner demonstrates that it has maintained on the reservation rates or patterns of social interaction that exist broadly

among the members of the entity and shared or cooperative labor or other economic activity among members.

§ 83.11(c)(3):

(3) The petitioner will be considered to have provided sufficient evidence to demonstrate political influence and authority if it demonstrates either of the following factors:

(i) The petitioner has maintained a State reservation, only if (a) the State in which the reservation is located confirms in writing that the petitioner exercised political influence or authority with regard to such reservation or (b) the petitioner demonstrates that it was able to mobilize significant numbers of members and significant resources from its members for entity purposes regarding the reservation, that most of the membership considered issues acted upon or actions taken by entity leaders or governing bodies regarding the reservation to be of importance, and that there was widespread knowledge, communications, or involvement in political processes about the reservation by most of the entity's members.

The Department's proposed state reservation proxy rule is apparently based on the notion that satisfying the present community and political authority is overly burdensome and unnecessary. The current criteria are not the problem. Acknowledgment presents complex and obviously very important questions of governmental power with extraordinarily serious ramifications for all involved. The present criteria appropriately require significant substantive inquiries and expansive factual findings. The proposed rule offers a fix that is seriously misguided. In effect, it creates an irrebuttable presumption founded on factual predicates that, in many circumstances, not only deserve evidentiary testing but are demonstrably wrong.

IV. The Language Used in § 83.4(a) Relating to Splinter Groups or Factions Should Be Clarified.

Proposed § 83.4(a) would limit the ability of splinter groups or factions to be acknowledged. Specifically, the proposed rule would provide that "[a] ***splinter group, political faction, community, or entity of any character that separates from the main body*** of a currently federally recognized Indian tribe, petitioner, or previous petitioner" will not be acknowledged unless "the entity can clearly demonstrate it has functioned from 1934 until the present as a politically autonomous community under this part, even though some have regarded them as part of or associated in some manner with a federally recognized tribe." Proposed § 83.4(a)(2) (emphasis added). It further would provide that "[a]n entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title (including ***reconstituted, splinter, spin-off, or component groups*** that were once part of previously denied petitioners)" will not be acknowledged unless the entity meets the requirements for re-petitioning, including the third-party consent requirement discussed above. Proposed § 83.4(a)(4) (emphasis added). The purpose of these provisions appears to be to avoid the factionalization of Indian tribes and to preclude splinter groups from obtaining acknowledgment when the group with which they were previously associated has been denied acknowledgment.

The State supports this purpose of the proposed rule, which is consistent with the BIA's past practice and acknowledgment decisions. However, the language used in the proposed rule to describe splinter groups and factions is somewhat inconsistent and

unclear. To achieve the purpose of the proposed rule and to avoid unnecessary administrative proceedings and litigation that will otherwise almost certainly ensue, the terms used in these provisions should be clarified and made consistent.

For example, a group calling itself the Schaghticoke Indian Tribe (SIT) presently has a petition pending. This group separated from the group now known as the STN relatively recently and claims the same history as the STN. In fact, in denying the STN's petition in 2005, the Department found that the failure of the STN to include within its membership certain "unenrolled members," principally members of the SIT who were descendants of significant Schaghticoke families, demonstrated a lack of community and political authority. *STN RFD*, at 58-62 (Oct. 11, 2005). The SIT has argued that it, not the STN, is the "main group" representing the Schaghticoke tribe, and that it was the STN, not the SIT, that separated from the main group. *See id.* at 63. The failure to clarify the provisions of § 83.4(a) will only serve to spur needless conflict and litigation over whether a group such as the SIT ought to be acknowledged when the two petitioners only recently separated.

Therefore, the State urges that the proposed § 83.4(a) be clarified as follows:

> § 83.4(a)(2):
>
> (2) A splinter group, <u>including any splinter, spin-off,</u> political faction, community, <u>component group</u> or entity of any character, that separates <u>or previously separated from, was once part of or associated with, or whose members share common descent from a historical tribe with</u> a currently federal recognized Indian tribe, a petitioner or a previously denied petitioner....

§ 83.4(a)(4):

> (4) An entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title (including any splinter groups as described in subsection (2) and any reconstituted, reorganized, or renamed groups that were once part of or associated with previously denied petitioners)....

V. The Time Period for Which the Criteria Must Be Satisfied Should Not Be Changed.

The Department proposes to require that community and political authority be established only since 1934, where the present regulations require it from the time of first contact with non-Indians. Proposed §§ 83.11(b), 83.11(c). The Notice indicates that 1934 was selected as an evidentiary starting point because that was the year the federal Indian Reorganization Act (IRA) was enacted. It states that

> the IRA represented a sea change in Federal policy that promoted tribal governments by providing a framework that would make it easier for the Federal Government to interact with the tribe as an independent sovereign nation. The passage of the IRA in 1934 was a communication to tribes that the Federal Government would no longer pursue destruction of tribal governments and communities. Prior to this date, tribes had little to gain, and much to lose, by making themselves known to the Federal Government.

Notice, at 12.

The proposed truncation of the time period for which community and political authority must be demonstrated is seriously at odds with the fundamental principle that tribal existence must be historically continuous. Continuity of existence has always been a basic requirement of tribal acknowledgment, both administrative and judicial. F. Cohen, *Handbook of Federal Indian Law*, at 271 (1942 ed.). Continuous existence as a

community and continuous exercise of political influence and authority within the community cannot simply be presumed because such a community presently exists or existed for some other period. *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Miami Nation of Indians of Indiana, Inc. v. United States Dept. of Interior*, 255 F.3d 342, 350-51 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002); Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New England L. Rev. 491, 496-98 (2003). The 1934 limitation is based on just such a presumption. Limiting the required proof rests on the factual assumption that if a petitioner can show tribal existence after 1934, the petitioner must have had continuous tribal existence before that period. That may be a reasonable presumption in some cases; but again, in others it might not.

Given its centrality to recognizing a tribal sovereign entity, the principle of continuity since historical times should not be abandoned or weakened. The present regulations adequately take into account the kinds of concerns that the proposed rule purports to address. The regulations expressly provide that the Department should take into account historical situations and periods for which evidence, including specifically for community and political authority, is limited or unavailable. 25 C.F.R. § 83.6(e). Therefore, if for example governmental policies can be shown to have created circumstances for a particular petitioner that accounts for a lack of evidence for a period, the Department can take those circumstances into account. Rather than dramatically shorten the time frame on the unproven assumption that evidence of community and political authority is absent because of governmental policies, a petitioner ought to have

to make a showing that justifies a different approach for specific historical periods. The existing regulations already allow for that flexibility on a petition-by-petition basis.

VI. The Definition of "Substantial Interrupton" Is Unncessary Particularly if the Time Period for Proving Community and Political Authority Is Shortened.

The acknowledgment regulations have required that a petitioner satisfy the criteria on a "substantially continuous basis," as would the proposed regulations. Proposed § 83.10(b)(4). A substantially continuous basis means "without substantial interruption." *Id.* However, the proposed rule would for the first time define an interruption in proof that will be excused to mean "a gap, either as a fluctuation in tribal activity or a gap in evidence, of 20 years or less, unless a 20-year or longer gap is reasonable given the history and the petitioner's circumstances." Proposed § 83.10(b)(5). The Notice indicates that "[t]his definition is intended to provide some clarity and uniformity with past practice in early Departmental acknowledgment decisions." Notice, at 15.

As discussed above, the requirement that a petitioner must satisfy the criteria of community and political authority on a continuous basis is directly tied to the concept of tribal existence. A tribe that is entitled to sovereign status is a community in which political relations and activities exist and have been maintained ***continuously***. *United States v. Washington*, 641 F.2d at 1372-74. If these attributes are not maintained continuously, sovereignty is lost. *Miami Nation*, 255 F.3d at 350-51.

Excusing a gap in a petitioner's evidence of continual existence as insubstantial could be justified in some circumstances. For example, a short gap in evidence, if surrounded by significant evidence before and after the gap, may reflect that the evidence

was lost or not preserved or even recorded for any number of reasons unrelated to the petitioner's existence as a tribe. This could particularly be the case for earlier periods in history, and Department past decisions have always taken account for this evidentiary issue. *E.g., Cowlitz FD*, at 15 (2000). However, a gap in evidence, especially those during the twentieth century involving more than a decade, could just as easily reflect that the group in fact did not exist as a community with political authority during the gap. *E.g., Duwamish FD*, at 18 (2001).

The determination whether a specific gap in evidence is substantial or not ought not be made on an arbitrary count of years, but rather should, as the Department has done in past decisions, be made on a case-by-case basis, evaluating the particular circumstances of that petitioner. Indeed, the Department appears to acknowledge that "substantiality" of an interruption in the evidence may depend on specific circumstances of a petitioner. The proposed definition would allow for periods even longer than 20 years "if reasonable given the history and the petitioner's circumstances." Proposed § 83.10(b)(5). Rather than arbitrarily defining all gaps of 20 years as excusable, the evaluation of evidentiary gaps should continue to be evaluated on a case-by-case basis, weighing considerations such as the timing and historical context, in addition to the length, in determining whether an interruption is substantial or not.

Moreover, the justification for a 20-year gap definition is substantially diminished if the Department changes the period for which the community and political authority criteria must be satisfied to after 1934. If a petitioner need only satisfy those criteria since 1934 – an eighty year period during which, compared to earlier historical periods,

evidence, including oral histories, would be more generally available if it exists – interruptions in evidence of 20 years ought to be unusual if a tribe actually existed. If these two changes are adopted together, a petitioner could be excused from demonstrating its existence for as much as a 25 percent – or more – of the period since 1934. Such a blanket rule is hard to square with the fundamental notion that tribal existence must be continuous. A petitioner should, given the substantial reduction in the historical scope of evidence that would be required, to make a showing at the very least as to why evidence has been difficult to produce. In the absence of such a showing, a petitioner ought to demonstrate continual existence throughout the post-1934 period. The proposed definition of substantial interruption should be discarded.

VII. The Proposed Articulation of the "Reasonable Likelihood" Standard of Proof Should Be Rejected.

The Notice indicates that the proposed rule would not change the burden of proof set forth in the existing regulations. Notice, at 10. Instead, it purports simply to articulate what the standard has always been. Specifically, the proposed § 83.10(a) provides that "[t]he Department will consider a criterion to be met if the available evidence establishes a reasonable likelihood that the facts claimed by the petitioner are valid and that the facts demonstrate that the petitioner meets the criterion. It then defines "reasonable likelihood" to mean "***there must be more than a mere possibility, but does not require 'more likely than not.***'" Proposed § 83.10(a) (emphasis added).

First, the Department makes no effort to show that this new articulation is in fact what the Department has understood the burden of proof to be and applied in the past

under the existing regulations. Indeed, the Department appears to contemplate that in past decisions this has not been how the standard has been applied; the "misapplication" of the reasonable likelihood standard is one of the grounds on which a previously denied petitioner could re-petition. Proposed § 83.4(b)(1)(ii)(B). Rather than show this articulation is consistent with past practice, the Department merely notes that courts that have reviewed past acknowledgment decisions have noted that "conclusive proof" is not required. Notice, at 10 (citing *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 212 (D.C. Cir. 2013)). Of course, there is a quite wide gulf between "more than a mere possibility" and "conclusive proof."

The Department has selected an articulation of the reasonable likelihood standard from an unlikely and unrelated context – challenges to jury instructions in criminal cases, which requires a showing of a reasonable likelihood, rather than a mere possibility, that jurors misunderstood or misapplied a jury instruction. *Id.* (citing *Boyd v. California*, 494 U.S. 370, 380 (1990)). However, the Department does not discuss why this is an appropriate standard for acknowledgment of an Indian tribe.

The State maintains that the proposed articulation of the reasonable likelihood standard is not an appropriate or justified one. Under the proposed articulation of the standard, a petitioner that more likely than not has ***not*** existed as a community with political authority might actually be acknowledged, so long as the evidence shows that it is more than a mere possibility that it did. This is unjustifiable. In *Boyd*, on which the Department exclusively relies for its articulation of the standard, the Court balanced the competing interests of finality and accuracy in criminal trials, adopting a reasonable

likelihood standard that requires something more than speculation that the jury misapplied a jury instruction but something less than a preponderance of the evidence. *Boyd*, 494 U.S. at 380. The interests here are very different.

Acknowledgment affords a tribe sovereign status and places it in a government-to-government relationship with the United States. The standard of proof ought to be a heightened one, albeit something less than "conclusive" proof, as the Department has always stated. To demand only more than a mere possibility, and less than more likely than not, simply does not correspond with the very serious ramifications, to petitioners and interested parties alike, of the decision to acknowledge. The proposed articulation of the burden of proof should be rejected. In its place, the Department should adopt an articulation of the reasonable likelihood standard of proof that requires that the petitioner show by more than a preponderance of the evidence, but less than conclusive proof, that it satisfies the criteria.

VIII. Interested Parties Should Have Full and Equal Access to Participate in the Acknowledgment Process.

The procedural rules governing the acknowledgment process should be informed by the principle that all participants – petitioners and interested parties – should be afforded an equal ability to participate fully. The proposed rules diverge from this principle in several important respects.

Under the present regulations, there is a distinction between "interested parties" that have certain procedural rights, for example the right to seek independent review and reconsideration before the IBIA and the Secretary, 25 C.F.R. § 83.11, and "informed

parties," who can request the opportunity to submit comments or evidence and to be informed of the process. 25 C.F.R. § 83.1. An interested party, under the current rules, includes any person or entity that "can establish a legal, factual or property interest in the acknowledgment determination" and who requests the opportunity to submit comments or evidence. *Id.* By definition, an interested party includes the governor and attorney general of the state in which a petitioner is located and may include local governmental units. *Id.*

The proposed rules would eliminate interested party status altogether and simply treat any person that submits comments or evidence as an "informed party." Proposed § 83.1. Also eliminated would be the procedural rights and protections that are presently afforded interested parties. Given the important ramifications of an acknowledgment decision for state and local governments as well as for certain private parties that can demonstrate legal or other interests at stake, this proposed change is entirely unjustified. Interested party status, and the rights to procedural participation accompanying it, should be retained.

In particular, the proposed rules would eliminate the existing independent administrative review through the IBIA and the Secretary. 25 C.F.R. § 83.11. Such review is presently available to both petitioners and interested parties. Connecticut's experience demonstrates the importance of review for interested parties, and not just petitioners, of independent review by the IBIA. In two decisions granting acknowledgment to Connecticut petitioners, the State and other interested parties sought IBIA review, and the IBIA concluded that the BIA had materially misapplied the

community and political authority criteria. *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1 (2005); *In re Federal Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 30 (2005). IBIA review should be retained. That such review may lengthen the overall process does not justify doing away with this important procedural safeguard.

In addition to eliminating IBIA review, the only independent administrative review that the proposed rule allows – a hearing before an Office of Hearings and Appeals judge after a negative proposed finding – is available only to petitioners. Proposed § 83.38. This is patently unfair. The process should treat petitioners and interested parties equally in the process. If petitioners have a right to seek a hearing after a negative proposed finding, interested parties ought to have an equivalent right to seek a hearing after a positive proposed finding.

IX. The Community and Political Authority Critieria Should Not Be Weakened.

The proposed rules make other changes to the key community and political authority criteria that would plainly lower the acknowledgment standards. The purpose of these changes in the substantive criteria appears to be simply to make obtaining acknowledgment easier. They should be rejected.

Proposed § 83.11(b)(1) weakens the community criterion by defining "predominant portion" of a group as 30 percent. The present community criterion requires "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." 25

C.F.R. § 83.7(b). Although the current regulations do not define "predominant portion," the Department's past decisions have consistently interpreted predominant to mean at least a majority of the group. *E.g., Chinook RFD*, at 34-38 (2002). The Department offers no evidence that the this common sense meaning of predominant portion has been difficult to administer or has somehow lead to improper findings. To lower the threshold to 30 percent arbitrarily weakens the standards that have been in place and applied to petitions for decades. The existing interpretation of predominant portion as a majority of the group should be retained.

The Notice also briefly discusses the concept of "bilateral political relationship" that has consistently been an important interpretive tool in the application of the political authority criterion. The Department states that "[t]he existing text of criterion (c) does not include such a requirement, and therefore the proposed rule makes no revision on this point." Notice, at 15. It is not entirely clear what this statement is intended to do. The requirements of criterion (c) demonstrate the existence of a bilateral political relationship – a relationship between leaders and group members that shows some level of mutual interaction and influence. As the Department has stated:

> It must be shown that there is a political connection between the membership and leaders and thus that the members of a tribe maintain a bilateral political relationship with the tribe. This connection must exist broadly among the membership. If a small body of people carries out legal actions or makes agreements affecting the economic interests of a group, the membership may be significantly affected without political process going on or without even the awareness or consent of those affected.

Miami FD, at 15 (1992), *aff'd, Miami Nation of Indians of Indiana, Inc. v. United States Dept. of Interior*, 255 F.3d 342, 350-51 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129

(2002). The concept of a bilateral political relationship flows directly from the regulation's definition of political influence or authority, which provides:

> Political influence or authority means a council, leadership, internal process, or other mechanism which the entity has used as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence.

Proposed § 83.11(c); 25 C.F.R. § 83.1. Although bilateral political relationship is not an express separate requirement, it is a way of describing what criterion (c) requires. The Department's brief discussion of it should not be deemed a rejection of this longstanding and straight forward concept.

In this regard, a new category of evidence the proposed rule adds for demonstrating political authority needs clarification. Proposed § 83.11(c)(1)(vii) provides as one form of evidence to demonstrate political authority: "a continuous line of entity leaders and a means of selection or acquiescence by a majority of the entity's members." The Department has consistently determined that the presence of leaders, especially self-appointed leaders, that do not actually exercise some form of influence or authority over members is not sufficient to satisfy the criterion. *Compare Mohegan FD*, at 18-25, 28 (1994) (discussing leadership selection satisfying criterion) *with Muwekma FD*, at 135-36 (2002) (rejecting evidence of council leadership). This new provision should be clarified consistent with this understanding. In particular, "acquiescence by a majority of the entity's members" cannot excuse the lack of actual political influence over the group's members. Indeed, acquiescence more typically is evidence of just the

opposite – that leaders are not exercising political influence or authority on important group issues, and as a result, members do not take an active interest in leadership selection. This proposed provision needs to clarified to reflect this distinction and not to undermine the criterion.

X. Conclusion

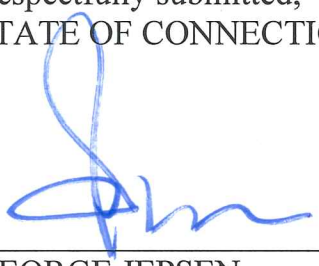
The proposed rules represent a dramatic departure from the substantive requirements that have governed acknowledgment decisions for nearly forty years. If adopted as proposed, petitioners could gain recognition in circumstances that would be at complete odds with fundamental principles of tribal acknowledgment, including:

- Recognizing splinter groups of previously denied petitioners that have substantially the same history and evidence of the denied petitioner.
- Acknowledging previously denied petitioners that have a small state reservation without any actual evidence that the maintenance of the reservation supported the existence of a distinct community with political influence or authority.
- Acknowledging a petitioner that, more likely than not, did not actually exist as a tribe for most of its history.
- Excusing the lack of any evidence of tribal existence for 25 percent or more of the historical record.
- Recognizing a petitioner with little or no meaningful political leadership or activity.

- Subjecting the State and its local communities to years of future uncertainty, despite having expended considerable resources and effort in past proceedings, with limited procedural rights under the new process.

The State submits that the proposed rules not be adopted, or in the alternative, that they be substantially modified to address the concerns raised.

Respectfully submitted,
STATE OF CONNECTICUT



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September 30, 2014

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Re: Comments on Proposed Rule on Hearing and Re-Petition Authorization Processes Concerning Acknowledgment of American Indian Tribes, RIN 1094-AA54

Dear Mr. Nelson:

On behalf of the State of Connecticut (State), George Jepsen, Attorney General of Connecticut, submits these written comments on the proposed rulemaking concerning the hearing and re-petition authorization processes concerning acknowledgment of American Indian tribes. The proposed rule is a corollary to the Bureau of Indian Affairs (BIA) proposed rules that would comprehensively revise the existing tribal acknowledgment regulations of 25 C.F.R. Part 83. Specifically, the proposed rule provides for procedures for hearings for petitioners who receive a negative proposed finding on their acknowledgment petitions and for hearings on requests to re-petition by previously denied petitioners, both of which are new proceedings contemplated by the BIA's proposed rules. The State has submitted comments on the BIA's proposed rules. Because this proposed rule incorporates certain provisions of the BIA's proposed rules about which the State has serious concerns, the State restates those comments for purposes of this proposed rule. In addition, the State comments on some provisions unique to this proposed rule.

The Provisions Allowing Previously Denied Petitioners to Re-Petition Does Not Adequately Protect the Interests of Third Parties in the Finality of Previous Acknowledgment Decisions.

In recognition of the compelling interests of third parties in the finality of previous acknowledgment decisions, the Department has proposed conditioning a previously denied petitioner's right to re-petition under the proposed regulations on the consent of third parties that

had participated in administrative or court review of those decisions. The better rule would be to preclude re-petitioning under such circumstances. Particularly given the uncertainty about potential legal challenges to the proposed third-party consent requirement, the protection the Department purports to offer to third parties is chimerical. The interests of third parties such as the State should not be put at risk in this way. Previously denied petitioners should not be permitted to re-petition.

Proposed § 4.1063 would provide that the administrative judge will issue a decision allowing a previously denied petitioner to re-petition if "[a]ny third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the petitioner has consented in writing to the re-petitioning...." Proposed § 4.1063(a). The proposed rule would also require that a previously denied petitioner prove by a preponderance of the evidence that a change from the previous regulations warrants reconsideration of the denial or that the "reasonable likelihood" standard of proof was misapplied in it. Proposed § 4.1063(b). This proposed provision corresponds with the BIA's proposed § 83.4(b).

Under the current regulations, previously denied petitioners are not allowed to petition again. 25 C.F.R. § 83.10(p). This should remain the rule. Where petitioners had a full and fair opportunity to present evidence and make their arguments and to seek administrative and judicial review of the decisions denying acknowledgment, there is no justification to permit the petitioners, and to require the interested parties to again expend their resources, to pursue acknowledgment anew. The proposed rule allowing re-petitioning should be eliminated.

The proposed rule offers a somewhat unique mechanism to protect the interests of third parties in the finality of past decisions. It proposes that third parties that participated in administrative or court review must consent to a previously denied petitioner's request to re-petition. The State recognizes that the Department is seeking to protect justified third party interests in proposing the consent requirement. However, it is rather novel, and its legality will likely be questioned. Indeed, the previously denied Connecticut petitioners have publicly challenged the constitutionality and lawfulness of the proposed rule, and if it is adopted as proposed, there will certainly be litigation about it. Although the State believes there are sound arguments in support of its lawfulness, no one can say with any reasonable certitude what the outcome of such litigation will be. The interests of third parties should not be put at such risk. The very purpose of the third-party consent requirement is to protect those parties from having to reengage with the administrative or court process; the novel nature of the requirement, however, appears to do just the opposite, exposing the third parties to extensive and uncertain litigation. The better course to protect the interests of third parties – a necessity that the Department recognizes – would be to preclude re-petitioning altogether.

The Proposed Articulation of the "Reasonable Likelihood" Standard of Proof Should Be Rejected.

The Notice indicates that the proposed rule would not change the burden of proof set forth in the existing regulations. Notice, at 2. Instead, it purports simply to articulate what the standard has always been. Specifically, the proposed § 4.1047(a) provides that "[t]he judge will consider a criterion to be met if the evidence establishes a reasonable likelihood that the facts

claimed by the petitioner are true and that the facts demonstrate that the petitioner meets the criterion." Section 4.1047(b) then defines "reasonable likelihood" to mean "***there must be more than a mere possibility, but does not require 'more likely than not to be true.***'" Proposed § 4.1047(b) (emphasis added).). This proposed provision corresponds with the BIA's proposed § 83.10.

First, the Department makes no effort to show that this new articulation is in fact what the Department has understood the burden of proof to be and applied in the past under the existing regulations. Indeed, the Department appears to contemplate that in past decisions this has not been how the standard has been applied; the "misapplication" of the reasonable likelihood standard is one of the grounds on which a previously denied petitioner could re-petition. Proposed § 4.1063(b)(2). Rather than show this articulation is consistent with past practice, the Department merely notes that courts that have reviewed past acknowledgment decisions have noted that "conclusive proof" is not required. Notice, at 3 (citing *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 212 (D.C. Cir. 2013)). Of course, there is a quite wide gulf between "more than a mere possibility" and "conclusive proof."

The Department has selected an articulation of the reasonable likelihood standard from an unlikely and unrelated context – challenges to jury instructions in criminal cases, which requires a showing of a reasonable likelihood, rather than a mere possibility, that jurors misunderstood or misapplied a jury instruction. *Id.* (citing *Boyd v. California*, 494 U.S. 370, 380 (1990)). However, the Department does not discuss why this is an appropriate standard for acknowledgment of an Indian tribe.

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Acknowledgment affords a tribe sovereign status and places it in a government-to-government relationship with the United States. The standard of proof ought to be a heightened one, albeit something less than "conclusive" proof, as the Department has always stated. To demand only more than a mere possibility, and less than more likely than not, simply does not correspond with the very serious ramifications, to petitioners and interested parties alike, of the decision to acknowledge. The proposed articulation of the burden of proof should be rejected. In its place, the Department should adopt an articulation of the reasonable likelihood standard of proof that requires that the petitioner show by more than a preponderance of the evidence, but less than conclusive proof, that it satisfies the criteria.

Interested Parties Should Have Equal Access to OHA Review.

The procedural rules governing the acknowledgment process should be informed by the principle that all participants – petitioners and interested parties – should be afforded an equal

ability to participate fully. In particular, the proposed rule provides for a hearing before an Office of Hearings and Appeals (OHA) judge after a negative proposed finding. This review is available only to petitioners. Proposed § 4.1002; *see* BIA Proposed § 83.38. This is patently unfair. The process should treat petitioners and interested parties equally in the process. If petitioners have a right to seek a hearing after a negative proposed finding, interested parties ought to have an equivalent right to seek a hearing after a positive proposed finding.

Other Issues

The Notice specifically requests comments on who the appropriate OHA judge should be for hearings relating to acknowledgment or re-petition decisions. The proposed rule would allow either an administrative law judge appointed under 5 U.S.C. § 3105, an administrative judge with OHA, or an attorney designated by the OHA director to serve as the OHA judge for these proceedings. Because of the importance of acknowledgment decisions and the need to ensure the integrity of the decision making process, the State believes that the hearings and decisions contemplated by the proposed rule should be done by an administrative law judge appointed under 5 U.S.C. § 3105.

The BIA's proposed rules would eliminate the existing independent administrative review through the Interior Board of Indian Appeals (IBIA) and the Secretary. 25 C.F.R. § 83.11. Such review is presently available to both petitioners and interested parties. Connecticut's experience demonstrates the importance of review for interested parties, and not just petitioners, of independent review before an independent administrative law judge. In two decisions granting acknowledgment to Connecticut petitioners, the State and other interested parties sought IBIA review, and the IBIA concluded that the BIA had materially misapplied the community and political authority criteria. *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1 (2005); *In re Federal Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 30 (2005). Such review would be unavailable under the proposed rule. That this review may lengthen the overall process does not justify doing away with this important procedural safeguard. It should be retained, and OHA's proposed rule should provide for it.

Finally, proposed § 4.1021(d) provides that a person who has an interest that may be adversely affected by a final determination on an acknowledgment petition may, by motion, seek to intervene as a matter of right. Because of the many significant ramifications for state and local governments that can follow from a decision to acknowledge an Indian tribe and the quasi-sovereign status attendant to such status, state and local government entities ought to be accorded

intervenor status by rule, requiring only the submission of a notice of intervention if the governmental entity chooses to avail itself of that status in the hearing.

Respectfully submitted,

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Senator Chris Murphy
Representative John Larson
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Representative James Himes
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